

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RAY LEE VAUGHN,

Defendant and Appellant.

F055267

(Super. Ct. No. SC068269A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Lee P. Felice,
Judge.

Jeffrey Kross, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri
and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Cornell, Acting P.J., Gomes, J., and Poochigian, J.

A jury convicted appellant Ray Lee Vaughn of two counts of forcibly committing a lewd or lascivious act upon a child under the age of 14 (Pen. Code, § 288, subd. (b)(1); counts 1, 2)¹ and a single count of first degree burglary (§§ 459, 460, subd. (a)). The jury also found true allegations that appellant committed each of the count 1 and count 2 offenses in the commission of a first degree burglary committed with the intent to commit a violation of section 288, subdivision (a) or section 288, subdivision (b)(1). (§ 667.61, subd. (a)) The court imposed a prison term of 25 years to life on count 1 and, on counts 2 and 3, concurrent terms of eight and six years respectively. Pursuant to section 654, the court stayed execution of sentence on counts 2 and 3.

On appeal, appellant's sole contention is that the court erred in instructing the jury with CALCRIM No. 1191 because that instruction, appellant asserts, lowered the burden of proof on the section 288, subdivision (b)(1) charges to less than that of beyond a reasonable doubt, in violation of his due process rights under the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

The victim of the offenses of which appellant stands convicted in counts 1 and 2 is S.M., who was seven years old at the time of those offenses.

The parties stipulated at trial that appellant had a 25-year-old daughter, T., who would testify that on one occasion when T. was seven years old, appellant pulled down her panties and fondled her vagina, and that appellant threatened to kill T.'s mother if she (T.'s mother) called the police.

Prior to trial, the court denied appellant's motion to exclude this evidence. The court ruled, in part, the evidence "would be admissible" under Evidence Code section 1108. Evidence Code section 1108 "allows evidence of the defendant's uncharged sex

¹ Except as otherwise indicated, all statutory references are to the Penal Code.

crimes to be introduced in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes.” (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009 (*Reliford*)).²

Later, over appellant's objection, the court instructed the jury, in the language of CALCRIM No. 1191, as modified for the instant case, as follows:

“The People presented evidence that the defendant committed the [crime] of lewd act with [T.] that was not charged in this case. This [crime] is defined for you in these instructions.

“You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged [offense]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

“If the People have not met this burden of proof, you must disregard this evidence entirely.

“If you decide that the defendant committed the uncharged [offense], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses and based on that decision, also conclude that the defendant was likely to commit and did commit Counts 1 and 2, as charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Counts 1 or 2. The People must still prove each element of every charge beyond a reasonable doubt.

“Do not consider this evidence for any other purpose except for the limited purpose of ... specific intent and motive as previously instructed.”

² Subdivision (a) of section 1108 provides: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352.”

DISCUSSION

Appellant contends CALCRIM No. 1191 is constitutionally deficient because, by instructing the jury that it could find he committed the uncharged sexual offense by a preponderance of the evidence, the instruction might mislead the jury into believing that it could convict him of the *charged* sexual offenses by a preponderance of the evidence. There is no merit to this contention.

In *Reliford, supra*, 29 Cal.4th 1007, the defendant raised a virtually identical constitutional challenge to the 1999 version of CALJIC No. 2.50.01, an instruction “similar in all material respects to CALCRIM No. 1191 ... in its explanation of the law on permissive inferences and the burden of proof.” (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 87 (*Schnabel*).) In rejecting the defendant’s argument, the court in *Reliford* stated: “Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed a prior sexual offense The instructions instead explained that, in all other respects, the People had the burden of proving defendant guilty ‘beyond a reasonable doubt.’” (*Reliford, supra*, at p. 1016.) As indicated above, *Reliford*’s reasoning is directly applicable to the instant case. (*Schnabel, supra*, at p. 87 [rejecting due process challenge to CALCRIM No. 1191].) Moreover, the instruction here, unlike the instruction under review in *Reliford*, affirmatively provided, “The People must still prove each element of the charge beyond a reasonable doubt.” (*Reliford, supra*, at p. 1012.) Accordingly, we conclude that that CALCRIM No. 1191 did not lower the prosecution’s burden of proof on the charged offenses to less than that of beyond a reasonable doubt.

Appellant contends the reasoning of *Reliford* is “flawed” However, we need not address this contention because, as appellant acknowledges, we are bound by

California Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant also relies on *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 (*Gibson*). In *Gibson*, the jury was instructed, using CALJIC No. No. 2.50.1 and the 1996 version of CALJIC No. No. 2.50.01, and told that if it found, by a preponderance of the evidence, that the defendant had committed a prior sexual offense, it could infer that he had a disposition to commit such offenses and that he was likely to and did commit the charged offenses. The Ninth Circuit held that the two instructions, read together, instructed the jury that it could find the defendant guilty based solely on facts it found true merely by a preponderance of the evidence. Although the jury was given other instructions on the burden of proof, it was not told how those instructions should be harmonized with CALJIC Nos. 2.50.1 and 2.50.01. (*Id.*, at pp. 822-823.)

Gibson is inapposite. The challenged instructions in that case did not include the critical language contained in the 1999 version of CALJIC No. 2.50.01 at issue in *Reliford* and in the version of CALCRIM No. 1191 at issue here which informed the jury that even if it found that defendant committed the uncharged act, it could not find him guilty of the offenses charged in counts 1 and 2 unless the evidence as a whole persuaded it beyond a reasonable doubt that defendant was guilty of those offenses. And, in any event, as demonstrated above, we are bound by *Reliford*.

DISPOSITION

The judgment is affirmed.